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In the

Supreme Court of the United States

..... Term 1974

No. ....73 - 1803

MARION MURTAGH and WILLIAM JOSEPH POWELL,
Petitioners

v.

UNIVERSITY COMPUTING COMPANY,
a Texas Corporation, et al,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above case on March 6, 1974.

OPINIONS BELOW

The Judgment of the Trial Court for the Northern District of Texas, Dallas Division, entered on the 5th day July, 1972 is unreported and is set forth as Item 24 of the Record, Vol. I. filed with the United States Court of Appeals for the Fifth Circuit, which Record has been transmitted by the Clerk of that Court to the Clerk of this Court. The Opinion of the United States Court of Appeals for the Fifth Circuit and the Order Denying a Petition for Rehearing by such Court appear in Appendix "A" hereto. The Opinion is reported at ....F. 2d 1468 (5th Cir. 1974).

JURISDICTION

The judgment of the Court of Appeals was entered on March 6, 1974. The denial of a timely Petition for Rehearing was entered on April 3, 1974. This Petition for Certiorari is filed within ninety (90) days of that date. The Jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED

(1) Were the Petitioners deprived of due process of law by the action of the Court of Appeals in refusing to review proceedings before the Trial Court because of an alleged failure to preserve certain points of error under the Federal Rules of Civil Procedure when such failure arose directly from instructions given Petitioners by the trial judge during the pendency of the case?

(2) When parties have entered into a valid compromise and settlement agreement, upon a clear repudiation by one party of his obligations under that agreement, may the non-repudiating party elect to accept that repudiation for purposes of avoiding his own obligations thereunder, and at the same time insist that the repudiating party be strictly bound by the agreement's terms?

(3) After parties have entered into a valid compromise and settlement agreement, when one of such parties expressly conditions his performance upon an additional undertaking by the other party not contained in that original compromise and settlement agreement, is such other party thereafter bound by such agreement?

(4) Upon allegations of fraud arising under the Securities Act of 1933 and the Securities Exchange Act of 1934, may the defrauded parties be held to have released all claims and causes of action against the fraudulent party without an express finding of fact upon the disputed issue of whether such defrauded parties had intentionally and knowingly waived their rights under such laws?

STATUTES INVOLVED

The pertinent portions of the Securities Act of 1933 (§14 and §17(a)), Securities Exchange Act of 1934 (§10(b) and §29(a)), and the Federal Rules of Civil Procedure, (Rules 49 and 51), are set forth in Appendix "B" hereto.

STATEMENT OF THE CASE

This is a suit for damages brought by Petitioners ("Murtagh and Powell") alleging certain causes of action against the Respondent ("U.C.C.") arising from breaches of contract, conversion of shares of common stock, and violations of the Securities Act of 1933 and the Securities Exchange Act of 1934. The transactions between these parties and ultimately this suit arose from a contract of sale whereby Murtagh and Powell sold to U.C.C. two computing companies wholly owned by Murtagh and Powell and located within Great Britain for a consideration comprised of certain sums of cash and shares of U.C.C. common stock.

The case was tried before a jury, and after the conclusion of the evidence the Trial Court, pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, submitted the case to the jury upon special interrogatories. By its answers the jury found all the elements necessary for Petitioners to recover on their claims that U.C.C. had made actionable misrepresentations and omissions and had wrongfully converted the stock owned by them. In response to additional interrogatories, however, the jury returned a verdict which

the Trial Court ruled established a settlement agreement between the parties. Based upon such verdict, the Trial Court entered judgment that Plaintiffs take nothing against the Defendant. The United States Court of Appeals for the Fifth Circuit upheld such judgment.

A complete statement of the facts can be found in the record on file herein, Volumes I through III. However, the material facts, as they relate to the questions presented to this Court, may be summarized briefly as follows:

In April, 1967, Petitioners Murtagh and Powell owned beneficially all of the outstanding shares in two computer companies operating and doing business in Great Britain. They were contacted in England by agents of U.C.C. soliciting an offer of sale of these companies. As a result of this contact, Murtagh and Powell traveled to the U.C.C. offices in Texas for purposes of investigating such a sale.

Thereafter, there were various representations and presentations made on behalf of U.C.C. to Murtagh and Powell in connection with such proposed purchase and sale, and Murtagh and Powell have alleged and the jury has found that such representations and certain omissions were fraudulent and in violation of the Securities Act of 1933 and the Securities Exchange Act of 1934.

Thereafter, Murtagh and Powell did agree to sell their existing companies to U.C.C. for certain sums of cash and shares of the common stock of U.C.C., all under the terms of a written Stock Purchase Agreement. Under such Agree-

ment Murtagh and Powell were to receive and did receive at various times a substantial number of shares of U.C.C. common stock. However, U.C.C., after the initial issuance of a portion of such stock, placed restrictive legends upon that stock, and communicated with various banks at which the Petitioners had pledged their stock, indicating that the stock was restricted as to sale, and that such shares were not freely marketable. As a result of these actions, which the jury found in its verdict to constitute a conversion of those shares of stock, Murtagh and Powell were unable to sell such shares of common stock for an extended period of time, and were thus damaged by U.C.C.'s action in a substantial amount, again found by the jury in their verdict.

The jury further found that in March, 1970, it was agreed in substance between Eldon Vaughn, acting for U.C.C., and Powell that in full and complete satisfaction of all claims and controversies between the parties U.C.C. would register the Plaintiff's U.C.C. stock with the Securities Exchange Commission and accelerate the remaining payments of U.C.C. shares and cash to become due under the amended Stock Purchase Agreement. After such Agreement, U.C.C. communicated with Powell, transmitting a form for general release, and indicating that such general release must be executed by Petitioners before U.C.C. could perform as earlier agreed under the compromise and settlement agreement. Powell indicated that this general release would not be signed and telegramed U.C.C. that the terms for settlement were not acceptable. Thereafter, U.C.C. failed to accelerate the remaining shares of stock

and cash, but insisted that Murtagh and Powell were in fact bound by the restrictions of the compromise and settlement agreement.

The Court of Appeals in its Opinion, held that U.C.C.'s insistence upon the performance of an additional term not part of the original agreement did not justify Petitioner's rejection of the compromise and settlement agreement, because the jury was not asked whether the imposition of such additional condition would justify such actions on the part of the Petitioners and, as a result, Petitioners waived their right to complain of such under Rule 49(a) of the Federal Rules of Civil Procedure. The Court further ruled that U.C.C. was not required to make an election upon receipt of Powell's telegram rejecting the compromise agreement, to either stand upon such agreement or accept the repudiation and refuse to perform, once more for the reason that Petitioners failed to object pursuant to Rule 49(a) of the Federal Rules of Civil Procedure to the Court's instruction in regard thereto. Finally, the Court ruled that it was unnecessary for Respondents to secure a finding that Petitioners were aware of their rights under the Securities Laws prior to compromising and settling their claims arising thereunder for the reason that such a finding was not requested by Petitioners pursuant to Rule 49(a) of the Federal Rules of Civil Procedure.

REASONS FOR GRANTING WRIT

1. *The Trial Court has so far departed from the accepted and usual course of judicial proceedings and the Court of Appeals has so far sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision.*

Following the close of the testimony in this suit the attorneys and the Court worked for approximately two full days in the preparation of the Court's Charge. During this period many objections were made by both parties to the form and substance of the proposed special issues and after hearing and listening to all of the objections of both parties, the Court's Charge was finally reduced to writing and the Court advised the attorneys to make such exceptions or objections as they might desire by dictating them to the court reporter and the Court further advised the attorneys that he was satisfied with the Charge and that he would not be present during the dictation of the respective objections and exceptions and actually was not present during such dictation, and no changes were made in the Court's Charge thereafter. (Findings In Regard To Objections To The Charge, Supplementary Record filed September 6, 1972.)

Following the preparation of the Court's Charge and after the discussions referred to, the Court instructed counsel to make whatever objections they chose and they would all be considered timely. He stated that these objec-

tions and exceptions should be made without his being present, that he had heard every possible objection and exception during the two-day preparation of the charge, and that any objections and exceptions made in this informal manner would be overruled by him. Thereafter, a court reporter was made available to the attorneys for both parties and each dictated to that reporter a shorthand or summary version of those objections and exceptions to the Court's Charge which had been discussed during the prior two days. In fact, the trial judge stated, *prior* to such dictation, "The objections are timely made *as are all requests for special instructions as well as special issues were timely made and considered by the Court.*" (emphasis added) (R. Vol. 1, Item 22).

Subsequently, the Petitioners filed a document styled "Plaintiffs' Objections and Exceptions to the Charge of the Court" (R. Vol. I, Item 17) wherein they made a more formal declaration of all those objections and exceptions previously made to the Charge and overruled by the Court. In response to this, the Respondent filed with the Court a Motion to Strike such instrument (R. Vol. I, Item 21) contending that only the shorter, condensed version of such exceptions and objections could be considered, despite the Court's earlier statements concerning the numerous and all-inclusive objections previously made. Thereafter, the Court granted the Defendant's Motion to Strike and made those findings of fact recited above. (R. Vol. I, Item 23).

In its Opinion, the Court of Appeals ruled that the Petitioners were precluded from raising various issues and

points of error in regard to the actions of the trial court in that the applicable rules of Federal Civil Procedure were not strictly adhered to, in spite of the trial court's instructions to the parties indicating that the precise formal requirements of the rules requiring exceptions and objections need not be complied with since he was "satisfied with the Charge and would not be present during the dictation of the respective objections and exceptions".

The Federal Rules of Civil Procedure dealing with exceptions and objections to special issues and to instructions to the jury provide that a party may except or object to those special issues or instructions prepared by the Court before such are submitted to the jury and that the Court is thereby required to rule on such either modifying its Charge or refusing to include them as it sees fit. Rules 49 and 51, *Federal Rules of Civil Procedure.* There is no requirement in either rule that this be done in writing by the parties, but rather it is only required that the objecting party state distinctly the matter to which he objects and the grounds for his objection. In fact, the courts dealing with this problem have held that written objections, while preferred, are not necessary so long as the record on appeal demonstrates that they were, in fact, made. (as demonstrated here by the Court's Finding.) *Hull v. U.S.*, 324 F.2d 817 (CA 5th, 1963); *Dunn v. U.S.*, 318 F.2d 89 (CA 5th, 1963); *Winstead V. Hildenbrand*, 159 F.2d 25 (CA Dist. Col., 1946); *Hower v. Roberts*, 153 F.2d 726 (CA 8th, 1946); *Swiderski v. Moodenbaugh*, 143 F. 2d 212 (CA 9th, 1944).

The Court of Appeals by its ruling has refused to give the Petitioners opportunity to complain of error on the part

of the Trial Court by holding them to the strict requirements of the applicable procedural rules, and has yet disregarded the Trial Court's actions in indicating to the parties that such strict adherence was unnecessary. To deprive these parties of a full and proper review of the Trial Court's actions in such circumstances, and especially in light of the handling by the lower court of the exceptions and objections to the Charge, constitutes a denial of due process and such a departure from accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision over those courts. The Petitioners assert that the requirements of the procedural rules were essentially and sufficiently complied with and that the action of the Trial Court in refusing to allow a formal documentation of those exceptions and objections previously made and ruled on by him as well as the action of the Court of Appeals in refusing to consider such exceptions and objections was error.

2. *The Court of Appeals has rendered a decision in conflict with decisions of other Courts of Appeal on the same matter and in conflict with applicable state law.*

(a) The jury having found in response to a special interrogatory that a compromise and settlement agreement was entered into between the parties in March of 1970, it is undisputed that thereafter Powell forwarded a telegram to U.C.C. on or about April 18, 1970, indicating that the proposed terms of the agreement were not acceptable. U.C.C. has contended in this suit that as a result of such telegram it considered this compromise and settlement

agreement to have been repudiated by the Petitioners and that it thereafter did not consider itself obligated to perform under the terms of the oral agreement and in fact, did not so perform. (R. 747, 1138-1139). If U.C.C. is correct in this assertion that the telegram of Powell acted as a repudiation or anticipatory breach of the compromise and settlement agreement, the law is well settled that U.C.C. had an option at that time to either accept the repudiation and rescind the contract, in which circumstance U.C.C. would have a cause of action against the Petitioners for damages occurring as a result of such breach, or it could elect to stand upon the terms of such agreement and require the Petitioners to abide by them. *Continental Casualty Co. v. Boerger,* 389 S.W.2d 566 (CCA 1965, writ dismissed); *Kingsbery v. Phillips Petroleum Company,* 315 S.W. 2d 561 (CCA 1958, writ ref., n.r.e.); *Humphrey v. Showalter,* 283 S.W.2d 91 (CCA 1955, writ ref., n.r.e.); *Engelbrecht v. Pitzer,* 279 S.W.2d 608 (CCA, 1955, writ ref., n.r.e.); *Vise v. Foster,* 247 S.W.2d 274 (CCA 1952, writ ref., n.r.e.); *Main v. Hopkins,* 229 S.W.2d 820 (CCA 1950, n.w.h.); *Hooper v. Bell,* 210 S.W.2d 870 (CCA 1948, writ ref., n.r.e.); *Green v. Franklin Dress Co.,* 137 S.W.2d 131 (CCA 1940, n.w.h.); *Texas Seed and Floral Co. v. Chicago Set and Seed Co.,* 187 S.W. 747 (CCA 1916, writ ref'd); *Humphrey v. Placid,* 142 F. Supp. 246 (E.D. Tex., 1956). Under the undisputed facts in our case, U.C.C. elected to rescind the agreement and cease performance under it (which gave it the right to sue for damages as a result of such anticipatory breach, although such has not been asserted by it in this suit) and having made such a binding election to rescind, the agreement can stand as absolutely no defense to the Petitioners' causes of action asserted in this suit.

The Court of Appeals, as pointed out above, has ruled in its Opinion that the Petitioners are precluded by the record in this case from making such complaint, and that further, since the Trial Court instructed without objection that there was no further obligation on U.C.C. to perform after the receipt of the April 18 telegram, that Petitioners are now bound by this declaration of the law on the case. Petitioners' complaint of this restrictive ruling of the Court of Appeals as such applies to this alleged point of error has been set forth above. However, Petitioners assert that the Federal Rules of Civil Procedure and the authorities thereunder, allow a recovery as sought by the Petitioners in this case, within the boundaries of the record before the Court of Appeals.

At the conclusion of all evidence, the Trial Court submitted its charge to the jury upon special interrogatories pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, thereby attempting to obtain specific factual findings in regard to those disputed matters of fact raised by the evidence. During the course of submitting the special interrogatories and in connection with Special Issue Number 22, that court stated:

> "You are instructed in this connection that UCC was not required to continue performance of its agreement, if any you have found in answer to Special Issue No. 22 above, after receiving the telegram from Powell on or about April 18, 1970".

When a case is submitted to a jury upon special interrogatories, the jury is required to ascertain answers only to

issues of fact, and instructions of law are neither appropriate nor required. *Cate v. Good Brothers, Inc.*, 181 F.2d 146 (CA 3rd, 1950); *Great American Insurance Co. v. Horab*, 309 F.2d 262 (CA 8th, 1962); *Walther v. Omaha Public Power District*, 412 F.2d 1164 (CA 8th, 1969).* In such a case the Court is not required to instruct the jury as to applicable law because the application of the pertinent and correct legal principles are for the court, not the fact finder. *Millard v. Municipal Sewer Authority of Lower Makefield*, 442 F.2d 539 (CA 3rd, 1971).

It is true, as pointed out by the Court Appeals in its opinion, that Rule 51 provides for instructions of law to the jury, but such instructions would apply, by definition, only to a general charge by the court, where it is encumbent upon the jury to make a general finding in favor of a party, based upon the facts as found by them and upon the law as given by the court. As to Rule 49(a), which the Court of Appeals has concluded precludes the Petitioners from complaining of the Trial Court's judgment in this regard, such procedural rule merely disallows a complaint as to "any issue of fact" which is omitted by the court and unobjected to by the parties. The Trial Court's action in our case in instructing the jury as to what he felt to be the applicable law arising as a result of Powell's telegram, was unnecessary, has not been and needs not be complained of by

*The one exception to this rule is that should the court submit to the jury a question of mixed fact and law, he must accompany such question with appropriate instructions of law explaining the legal standards which they are to apply. *McDonald v. Timmerman*, 269 F.2d 54 (CA 8th, 1959); *Jackson v. King*, 223 F.2d 714 (CA 5th, 1955). In the case at bar, Special Issue No. 22 is an issue entirely of fact with no legal conclusions sought of the fact finder, and no instructions of law required. Therefore, this exception is not applicable.

either party, and is uncontrolling upon the decision of this court as to the true legal principle to be applied to the jury's special verdict. *Clayton v. Burston*, ...F.2d.... (5th Cir. May 3, 1974). No authority was cited by the Court of Appeals in its decision nor does any exist that the Trial Court, by his erroneous and unnecessary instruction of law, given in connection with a charge on special interrogatories, may alter established law or impose upon the parties a theory of law inconsistent and in direct conflict with the established legal principles applicable to the jury's finding.

Therefore, although the Court of Appeals rather summarily stated that Petitioners are precluded by Rule 49(a) from complaining of the Trial Court's erroneous instruction of law, and by implication that they are bound by such erroneous instruction that Court has misconstrued the applicable procedural rule. If, in fact, the instruction cited above and given by the Trial Court is erroneous, and if, in addition, the correct legal proposition, when considered in conjunction with the jury's factual findings, affords the Petitioners a basis for relief, such relief should be forthcoming under the record before this court. *Clayton v. Burston, supra.*

Despite the Trial Court's erroneous instruction of law cited above, the legal duty or election of U.C.C. is not as construed by the Trial Court, but rather U.C.C. had mutually exclusive options available to it, as a result of Powell's telegram, and the jury's verdict, as well as the undisputed evidence in the case, demonstrates that the course of action taken by U.C.C. will allow a recovery by Petitioners under the causes of action as found by the jury.

The laws of this state are unquestioned that a party may anticipatorily breach or repudiate a contract prior to the date set for its performance. *Pollack v. Pollack,* 39 S.W. 2d 853 (Comm. App., 1931). It is undisputed before this court that U.C.C. considered Powell's telegram as such a repudiation. However, a threat to repudiate a contract may be withdrawn, leaving no cause of action even for nominal damages, unless the party entitled to performance has manifested an election to accept the repudiation and rescind the contract. *Kingsbery v. Phillips Petroleum Co., supra.*

The general rule is that when one party to a contract has repudiated, the other party may (1) rescind and consider the contract at an end, or (2) may treat such conduct as a breach of contract and bring action for damages arising from such breach, or (3) he may treat the repudiation as inoperative and await the time when the contract is to be performed, then hold the other party responsible for all consequences of non-performance. *Humphrey v. Showalter, supra.* If the party not in default elects to keep the contract open, he keeps it open for the benefit of the opposite party as well as for his own, *and remains subject to all his own obligations and liabilities under it. Pollack v. Pollack, supra; Wellington R.R. Committee v. Crawford,* 216 S.W. 151 (Comm. App., 1919); *Vise v. Foster, supra;* 17 *C.J.S. Contracts,* Sec. 472; 10 *Tex. Jur.* 455.

In the case at bar, had U.C.C. elected and chosen to stand upon the settlement agreement and to obtain the benefit of Petitioners' agreement for "satisfaction of all

claims and controversies", they should have performed their obligations, which, under the terms of the contract of settlement itself, would have affected the settlement of "all claims and controversies" without further action or defense on behalf of Petitioners. On the other hand, had U.C.C. chosen to accept the repudiation, they were entitled to cease performance of their obligations under the settlement agreement and sue Petitioners for any damages arising from the breach, which in this case would amount to the costs and expenses of registering Petitioners' shares of stock in partial satisfaction of the settlement agreement itself. Here, U.C.C. has attempted to retain the benefits of the contract and of the repudiation as well, by insisting that all claims have been released while at the same time refusing to pay the agreed consideration for such release. Where a contract has been repudiated, the party not in default has alternative remedies open to him but he may not pursue all of them and specifically may not claim damages for an anticipatory breach and at the same time keep the contract in force. *Lumberman's Mutual Casualty Company v. Klotz*, 251 F.2d 499 (CA 5th, 1958).

It is of no comfort to the Defendant-Respondent to claim that as a result of Powell's telegram, they were no longer required to tender performance or "do a useless act". By the terms of the settlement agreement, all actions and duties under such agreement were imposed upon University Computing Company, after the accomplishment of which, claims and controversies were compromised by operation of the document itself. U.C.C. had only to complete its undertakings by the compromise agreement, and Peti-

tioners would have been forever barred from asserting any claim as made here. However, U.C.C. chose instead to refuse to pay the bargained for consideration, and whether such was their intended result or not, as a matter of law they are not entitled to rely upon the compromise recited in the agreement.

The Court of Appeals in its opinion has treated lightly the Petitioners' complaint as to the failure to *accelerate* cash and shares of stock under the settlement agreement and has concluded that ". . . U.C.C. performed a substantial part of what it had undertaken by the settlement agreement to do . . ." It is submitted that a partial or "substantial" compliance is no just basis for foreclosing the rights of the Petitioners.

The jury in response to the special interrogatories submitted to it found all elements of Securities Act fraud, and conversion by the Defendant UCC and in addition found quite substantial damages resulting to Petitioners from U.C.C.'s actions. It could hardly be disputed that the consideration agreed upon in the compromise agreement, i.e. the registration and acceleration of shares of stock and the acceleration of sums of cash, was indeed meager when compared with the actual damages sustained by Petitioners as a result of U.C.C.'s acts. In light of this, Murtagh and Powell certainly had a right to insist upon full and complete performance by U.C.C. of its obligations before extinguishing their claims against it, and should not be foreclosed by a showing of a token or "substantial" effort toward compliance.

(b) The jury has found that U.C.C. and Powell entered into an oral settlement agreement in March of 1970. However, the evidence before the Trial Court, when considered in light of the existing applicable law, shows that as a matter of law, U.C.C. through its subsequent acts repudiated and abandoned such settlement by attempting to impose additional and more burdensome conditions to that intital agreement and that as a result of this repudiation, Petitioners elected to rescind the oral settlement by Powell's telegram of April 18, 1970.

The law is well settled that an anticipatory breach will be recognized as actionable by the courts of this state; and, where such a breach is shown to exist, the courts will give immediate relief thereon. *Humphrey v. Placid, supra; Pollack v. Pollack, supra; Wukosh v. Hoover,* 247 S.W.2d 593 (CCA 1952, aff. 254 S.W. 2d 507). In addition, after such repudiation the party complying with the terms of the contract can either accept the repudiation and rescind the contract or, he may elect to stand on the terms of such agreement and sue for damages upon the performance date. *Green v. Franklin Dress Company, supra; Hooper v. Bell, supra; Texas Seed and Floral Co. v. Chicago Set and Seed Co., supra; Engelbrecht v. Pitzer, supra.*

Furthermore, it has been held in a number of Texas cases that where one party attempts to impose on the other contracting party additional conditions to an existing contract, such that, unless such conditions are met, the contract will not be honored, this will be considered as a repudiation of the existing contract and the other party

may regard such repudiation as an anticipatory breach of the contract. *Humphrey v. Placid, supra; Balfour v. Brown,* 110 S.W. 2d 104 (CCA 1937, n.w.h.); *Swift v. Continental,* 170 S.W. 114 (CCA 1914, writ ref'd); *Weiss v. DuroChrome,* 207 F.2d 298 (CA 8th, 1953); *Kromer v. Photo-Scan,* 305 F. Supp. 461 (N.D.Tex., 1969); *American Fidelity v. Williams,* 34 S.W. 2d 396 (CCA 1930, writ ref'd.); *Great American Indemnity Company v. City of Corpus Christi,* 192 S.W. 2d 917 (CCA 1945, writ ref., n.r.e.); *National Life Company v. Harvey,* 159 S.W.2d 920 (CCA 1942, n.w.h.).

The Respondents have heretofore taken the position that the requirement of the general release by U.C.C. was no more burdensome than the oral agreement already reached by the parties. However, an examination of that agreement as found by the jury will demonstrate that there was not one single obligation on the part of Petitioners in this oral settlement in that the actions thereunder were completely unilateral on the part of U.C.C. and once it had performed and completed those acts required of it, all claims and controversies between the parties were satisfied by the operation of the agreement itself. There was no obligation, duty, or required performance on the part of either of the Petitioners necessary to satisfy the oral agreement and this included the execution of any general release form.

The Court of Appeals in its Opinion has again ruled that Petitioners may not be allowed to raise this point on appeal because it "was not the subject of an interrogatory, nor did Appellants request that it be". The Petitioners assert in this regard that the *factual* basis for their position exists

within the record before the Trial Court and is undisputed and was therefore improper for submission to the jury. There remains only the application of the appropriate law to these undisputed facts which Petitioners assert was for the court and not the jury.

(c) It is the settled law in regard to Securities Act fraud actions that any attempt to settle a dispute or waive violations of the applicable statutes is void as against public policy. Section 14 of the Securities Act of 1933 states:

> "Section 14. Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void."

Section 29(a) of the Securities Exchange Act of 1934 provides, in part:

> "Section 29(a). Any condition, stipulation or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder or of any rule of an exchange required thereby shall be void."

In *Pearlstein v. Scudder & German,* 429 F.2d 1136 (CA 2nd, 1970), the Court held that a stipulation entered into during a trial in a state court, which waived the Plaintiffs' rights under the Securities Exchange Act of 1934, was void in light of Section 29(a) of that Act.

Thereafter, in *Cohen v. Tenney Corp.*, 318 F. Supp. 280 (D.C., N.Y., 1970), a general partnership had gone under and the limited partners were claiming fraud in the sale of the limited partnership interest. The general partner sent a check to the limited partners as a settlement of their claims. On the back of the check was contained a general release and such was signed when the limited partners endorsed the checks. These limited partners then brought suit under Section 17(a) of the Securities Act of 1933 and these releases were pled as an affirmative defense. In its decision, the Court held the release void and stated:

> "In light of the public policy controlling the enforcement of the 1933 Securities Act and the 1934 Securities Exchange Act as expressed in *Pearlstein,* I hold that general releases here offered as an affirmative defense to violation of those acts must be dismissed as void."

Upon a rehearing of this case, the Court changed its position to some extent and stated:

> "The Court of Appeals for this circuit has recently treated the question of the validity of postcontroversy settlements of Securities Act claims in *Pearlstein v. Scudder & German* . . . I do not find that decision controlling here . . . .
>
> "The importance of *Pearlstein,* in my view, is not that all settlements of mature claims short of litigation are void; but rather that they are not necessarily above judicial scrutiny as the District Court in that case had erroneously ruled. Since the 1933 Securities Act does not require persons aggrieved by violations of

its provisions to sue, this general release purporting to settle an already ripened controversy, is not by its terms void as a matter of law.

"This inquiry however does not end here. Judicial hostility toward waivers generally requires that the right to private suit for alleged violation be scrupulously preserved against unintentional or involuntary relinquishment. Otherwise, renegotiation of settlements would indeed undermine, rather than abet, the cause of effective enforcement of the interest which the community as a whole, as well as the aggrieved individual, has in regulation of the securities markets. This court, therefore, must afford the parties opportunity to produce evidence of the circumstances surrounding the obtaining of the release . . ."

In light of the clear wording of the statutes cited and of their interpretation by the court of Appeals in the *Pearlstein* case, it is apparent that an attempted compromise and settlement, in a case such as ours, is not effective and will be considered void as against public policy. Even assuming that the District Court in the *Cohen v. Tenney* case was correct in its restrictive application of the statute, the evidence in the case at bar clearly establishes that any settlement or attempted settlement by the Petitioners represented an "unintentional or involuntary relinquishment" of their rights and protections under the federal securities laws, and that the Trial Court should have found the attempted settlement wholly insufficient in regard to U.C.C.'s violations.

In the case of *Childs, et al v. RIC Group, Inc.*, CCH Fed. Sec. Law Rep., Section 93,333 (D.C., Georgia, 1970), the

Court, in discussing the defendant's contention that the plaintiffs had waived any rights they may have had under the Securities Exchange Act of 1934 to complain of the defendant's wrongful acts, stated,

> "Waiver of rights under the Securities Exchange Act of 1934 should be limited to cases where it is intentional. Therefore, to support a finding of waiver, *it must be found that the particular statutory right was actually known.* A party does not waive these rights without acting in full knowledge thereof." (Emphasis added.)

In the first place, it should be pointed out that there is no evidence whatsoever in the record of this case to demonstrate that Murtagh and Powell were informed of the "particular statutory rights" afforded them by the Securities Acts. However, even had such evidence existed in the record of the case, as pointed out by the Court in *Childs,* U.C.C. must have a finding of fact that the particular statutory right was actually known, and obviously no such finding exists.

In the case of *Royal Air Properties, Inc. v. Smith,* 333 F.2d 568 (CA 9th, 1964), the Court, in discussing the defendant's defense of a waiver of the plaintiff's rights under the applicable Securities Act, stated the following,

> "It has been held by this Court that waiver is 'the voluntary or intentional relinquishment of a known right. It emphasizes the mental attitude of the actor.' Since waiver is a voluntary act, there must be knowledge of the right in question before the act of relinquishment can occur.

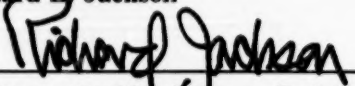
"Although the formulation of the doctrine is simple, the Courts have not been uniform in deciding what facts will support a waiver. In particular they have differed as to what constitutes knowledge of a right claimed to be waived. Some Courts have held that there is a duty to make inquiry if one learns facts sufficient to put him upon notice and that knowledge of all the facts that a reasonably diligent inquiry would disclose would be imputed. Others have stated that full knowledge of a right is a prerequisite to its waiver; one stated 'the doctrine of waiver and ratification is founded upon the fact of knowledge of all the facts, and not upon negligence.'

"When waiver is predicated upon facts of which one has inquiry but not actual notice, it is no longer intentional. We feel that waiver of rights under the Securities Exchange Act of 1934 should be limited to those cases where it is intended and therefore the right in question must be found to be actually known before waiver becomes effective. This is as it should be because there is a period of limitations applicable to cases brought under Section 10(b); the statutory period should not be cut short by a waiver with the mental element disregarded. To hold one to diligence in discovering his rights is reasonable in the case of laches or estoppel, where another has acted in the interim to his detriment. The defenses of laches or estoppel do not spring principally from intent, as does waiver, but from injury to the deceived party caused by the neglect or misleading action to the delaying party. But no detriment to a third party is required for waiver, it is unilaterally accomplished. We therefore see no reason to find a waiver if one has not acted with full knowledge of his rights." (p. 571).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,
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Appendix "A"
Opinions In The Lower Courts
In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2893

In The Matter Of: MARION MURTAGH and
WILLIAM JOSEPH POWELL
Appellants

versus

UNIVERSITY COMPUTING COMPANY
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

March 6, 1974

Before AINSWORTH, GODBOLD and INGRAHAM,
Circuit Judges



INDEXED

Marion MURTAGH and William Joseph Powell, Plaintiffs-Appellants,

v.

UNIVERSITY COMPUTING COMPANY, a Texas corporation, et al., Defendants-Appellees.

No. 72-2893.

United States Court of Appeals, Fifth Circuit.

March 6, 1974.

Sellers brought action against corporation for damages arising from sale to corporation of two companies in exchange for corporation's common stock and cash and alleged violations of antifraud provisions of federal securities laws and Texas Business and Commerce Code, breach of contract and conversion of property. The United States District Court for the Northern District of Texas, William M. Taylor, Jr., Chief Judge, rendered judgment for the corporation and the sellers appealed. The Court of Appeals, Godbold, Circuit Judge, held that evidence sustained determination that parties had orally agreed to settle dispute; that even if jury's finding omitted necessary factual findings, it would be deemed that district court, in accord with its entry of judgment for corporation, made findings that antecedent bona fide disputes existed between parties as to whether corporation committed fraud and conversion and, therefore, settlement agreement was adequate to bar recovery under fraud and conversion claims as well as under claim for breach of contract.

Affirmed.

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

1. Compromise and Settlement 2

Creation of a settlement agreement requires meeting of the minds of contracting parties on subject matter of the agreement.

2. Compromise and Settlement 23(3)

Testimony of corporation's general counsel that he and one seller of companies to corporation had orally agreed that, if corporation would register stock given to sellers in payment for companies and accelerate remaining payments of stock and cash due them, sellers would release corporation from any liability under stock purchase agreement and not initiate litigation against corporation sustained determination that parties had orally agreed to settle sellers' claims against corporation arising from the sale.

3. Compromise and Settlement 6(2)

Existence of an antecedent bona fide dispute between parties concerning subject matter of a subsequent settlement agreement is sufficient legal consideration for creation of an enforceable settlement agreement.

4. Compromise and Settlement 23(1)

Party claiming that settlement agreement has been created has burden of exhibiting that bona fide dispute existed as to subject matter.

5. Compromise and Settlement 16(1)

In action arising from sale of companies to corporation in exchange for stock and cash, even if jury omitted factual findings necessary to establish that agreement of parties to settle dispute was applicable to sellers' claims against corporation for violation of antifraud provisions and for conversion as well as to claim for breach of contract, where neither party raised objection to adequacy of special issue submitted to jury, it would be deemed that district court, in accord with its entry of judgment for corporation, made findings that antecedent bona fide dispute existed between parties as to whether defendant had committed fraud and conversion; thus, settlement agreement barred claims for violations of antifraud provisions and for conversion as well as claim for breach of contract. Securities Act of 1933, §§ 4, 5, 17(a), 15 U.S.C.A. §§ 77d, 77e, 77q(a); Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j; V.T.C.A., Bus. & C. § 27.01; Fed.Rules Civ.Proc. rules 49(a), 52(a), 28 U.S.C.A.

6. Compromise and Settlement 3

Agreement to settle claim against corporation for alleged violation of antifraud provisions of federal securities laws was not void as against public policy. Securities Act of 1933, §§ 4, 5, 17(a), 15 U.S.C.A. §§ 77d, 77e, 77q(a); Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j.

7. Securities Regulation 131

Federal securities laws do not compel persons harmed by acts violating provisions of the laws to seek their remedies only through litigation. Securities Act of 1933, §§ 4, 5, 17(a), 15 U.S.C.A. §§ 77d, 77e, 77q(a); Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j.

8. Compromise and Settlement 3

Settlements of claims arising from acts which are violations of the securities laws are not void as a matter of law, at least, where such settlement agreements do not themselves continue the precise conduct which violates the laws. Securities Act of 1933, §§ 4, 5, 17(a), 15 U.S.C.A. §§ 77d, 77e, 77q(a); Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j.

9. Securities Regulation 101

Judicial hostility toward waivers of statutory rights requires that the rights to private suit extended by the securities laws for alleged violations be scrupulously preserved against unintentional or involuntary relinquishment. Securities Act of 1933, §§ 4, 5, 17(a), 15 U.S.C.A. §§ 77d, 77e, 77q(a); Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j.

GODBOLD, Circuit Judge:

Appellants Murtagh and Powell, subjects of the United Kingdom, sued University Computing Co. (UCC), a Texas corporation, for damages arising from their sale to UCC of two computer companies[1] for UCC common stock and cash. Appellants charged they suffered these damages because of the following alleged acts or omissions by UCC. (1) UCC in violation of antifraud provisions of federal securities laws[2] and the Texas Business and Commerce Code[3] made material misrepresentations that the UCC stock to be paid appellants could be freely sold in the over-the-counter market or through a stock exchange at any time after such shares were delivered, and failed to disclose the consequences which could result from UCC's failure to register the stock in accordance with federal securities laws. (2) UCC breached a written contract (the Stock Purchase Agreement dated June 30, 1967), wherein UCC agreed to exchange UCC common stock and cash for all the stock in appellants' two computer companies by delivering stock to appellants which could not be freely sold immediately after delivery in the over-the-counter market or through a stock exchange. (3) UCC wrongfully converted appellants' property by placing restrictive legends upon the UCC stock

[1] Computer Services (Birmingham, England) Ltd. and Computer Bureau (Shannon, Ireland) Ltd.

[2] Appellants pleaded violations of § 17(a) of the Securities Act of 1933 [15 U.S.C.A. § 77q(a) (1971)], § 10(b) of the Securities Exchange Act of 1934 [15 U.S.C.A. § 78j(b) (1971)] and of SEC Rule 10b-5 [17 C.F.R. § 240, 10b-5 (1972)].

[3] Section 27.01, Vernon's Tex. Bus. and Comm. Code Ann. (1968).

delivered to them[4] and by advising third parties[5] that the UCC stock owned by appellants could be sold only subject to restrictions imposed by the federal securities laws.

At trial the court, pursuant to Fed.R.Civ.P. 49(a), submitted to the jury a series of written questions, which we set out in the margin together with the jury's answers, with the exception of questions not essentially related to the points we discuss below.[6] By its answers the jury found all

[4] It is not disputed that the stock UCC issued appellants as partial consideration for selling their companies was unregistered. *See* 15 U.S.C.A. § 77e (1971). UCC contends, however, that the stock was issued in a "private placement" transaction which was exempted from the registration provisions of the securities laws, *see* 15 U.S.C.A. § 77d (1971), and that the legends were necessary and proper to establish and preserve this exemption. Our disposition of the appeal makes it unnecessary for us to rule on UCC's contentions and to decide whether such legends could, as a matter of law, constitute acts of conversion.

[5] UCC contends that letters to such third parties as a matter of law, could not constitute conversion. Again, our disposition of the case allows us to pretermit adjudication of this contention.

[6] "SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that, in connection with the negotiations leading up to the execution of the Stock Purchase Agreement dated June 30, 1967, the officers or agents of University Computing Company acting as such represented to Marion Murtagh and William Joseph Powell that the shares of the common stock of University Computing Company which were to be delivered to them pursuant to such Agreement could be freely sold in the over-the-counter market or through a stock exchange at any time after such shares were delivered?

Answer 'They did' or 'They did not.'

ANSWER: *They did*

If you have answered Special Issue No. 1 'They did,' answer Special Issue No. 2; otherwise, you need not answer same.

"SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that the representation mentioned in Special Issue No. 1 was false?

Answer 'it was false' or 'It was not false.'

ANSWER: *It was false*

If you have answered Special Issue No. 2 'it was false', answer Special Issue No. 3; otherwise, you need not answer same.

the elements necessary for appellants to recover on their claims that UCC had made actionable misrepresentations and omissions and had wrongfully converted stock owned

"SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that the officers and agents of University Computing Company making the representation mentioned in Special Issue No. 1 either knew that such representation was false or did not know whether it was true or false?

Answer 'Yes' or 'No'

ANSWER: *Yes*

If you have answered Special Issue No. 3 'Yes', answer Special Issue No. 4; otherwise, you need not answer same.

"SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that such representation was of a material fact?

Answer 'Yes' or 'No'

ANSWER: *Yes*

If you have answered Special Issue No. 4 'Yes', answer Special Issue No. 5; otherwise, you need not answer same.

"SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that Marion Murtagh and William Joseph Powell relied upon such representation in connection with the purchase of the common stock of University Computing Company?

Answer 'They did' or 'They did not'

ANSWER: *They did*

If you have answered Special Issue No. 5 'They did,' answer Special Issue No. 6; otherwise, you need not answer same.

"SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that, as a result of the securities not being freely saleable in the over-the-counter market or on a stock exchange, Marion Murtagh and William Joseph Powell sustained monetary loss?

Answer 'They did' or 'They did not'

ANSWER: *They did*

"SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that officers and agents of University Computing Company acting as such failed to state to Marion Murtagh and William Joseph Powell the consequences which could result from the failure of University Computing Company to register under the Securities Act of 1933 the sale of the shares of common stock of University Computing Company to be delivered to them pursuant to the Stock Purchase Agreement dated June 30, 1967, as amended by Agreement dated July 18, 1968?

Answer 'They failed to do so' or 'They did not fail to do so'

by them. But by its answers to questions 20-22 the jury also made findings material to the creation and effect of a settlement agreement between the parties. The trial judge,

ANSWER: *They failed to do so*

If you have answered Special Issue No. 7 'They failed to do so', answer Special Issue No. 8; otherwise, you need not answer same.

"SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that the omission to make the statement mentioned in Special Issue No. 7 was an omission to state a material fact necessary, in the light of the circumstances under which made, to make the facts stated not misleading?

Answer 'It was' or 'It was not'

ANSWER: *It was*

If you have answered Special Issue No. 8 'It was,' answer Special Issue No. 9; otherwise, you need not answer same.

"SPECIAL ISSUE NO. 9

Do you find from a preponderance of the evidence that Marion Murtagh and William Joseph Powell would not have purchased shares of the common stock of University Computing Company but for the omission to state a material fact as heretofore found by you in reply to Special Issues Nos. 7 and 8?

Answer 'They would' or 'They would not'

ANSWER: *They would not*

If you have answered Special Issue No. 9 'They would not', answer Special Issue No. 10; otherwise, you need not answer same.

"SPECIAL ISSUE NO. 10

Do you find from a preponderance of the evidence that, as a result of the omission to state a material fact as heretofore found by you in reply to Special Issues Nos. 7 and 8, Marion Murtagh and William Joseph Powell sustained monetary loss?

Answer 'They did' or 'They did not'

ANSWER: *They did*

"SPECIAL ISSUE NO. 11

Do you find from a preponderance of the evidence that the acts and conduct of University Computing Company in the following particulars under all the facts and circumstances before you amounted to a 'conversion' of any of the shares of Marion Murtagh and William J. Powell that they had received or had a right to receive:

A. The act and conduct of University Computing Company in the placing of a 'Legend' or language indicating some character of restriction upon any shares in fact delivered to them after December 31, 1968?

Answer 'It did' or 'It did not'

ANSWER: *It did*

relying upon the answers, entered judgment for UCC. Only Murtagh and Powell appeal. We affirm the judgment of the District Court.

B. The act and the conduct of University Computing Company in causing the letters in evidence before you to be directed to Barclays Bank DCO Nassau?

Answer 'It did' or 'It did not'

ANSWER: *It did*

C. The act and conduct of University Computing Company in causing the letters in evidence before you to be directed to First National City Bank (Channel Islands) Ltd.?

Answer 'It did' or 'It did not'

ANSWER: *It did*

If you have answered any of the above and foregoing Special Issues 11A, 11B, or 11C 'It did' then answer the following Special Issues:

"SPECIAL ISSUE NO. 12

Do you find from a preponderance of the evidence that such conduct was a conversion of:

A. The 21,000 shares Marion Murtagh received in late December 1967 and January 1968?

Answer 'It was' or 'It was not'

ANSWER: *It was*

B. The 5,379 shares received by Marion Murtagh that were due to her December 31, 1968!

Answer 'It was' or 'It was not'

ANSWER: *It was*

C. The 473 shares received by Marion Murtagh in late February 1970 as the result of an earlier stock dividend?

Answer 'It was' or 'It was not'

ANSWER: *It was*

D. The 6600 shares due to be received by Marion Murtagh December 31, 1969?

Answer 'It was' or 'It was not'

ANSWER: *It was*

"SPECIAL ISSUE NO. 13

Do you find from a preponderance of the evidence that such conduct was a conversion of

A. The 7,000 shares William J. Powell received in late December 1967?

Answer 'It was' or 'It was not'

ANSWER: *It was*

The parties present a multitude of points and counter-points for our disposition,[7] but once the dust settles it becomes clear that the dispositive points are the findings concerning the settlement agreement and its legal effect. As to these points appellants have raised essentially three different groups of contentions.

[1, 2] 1. They attack the sufficiency of the evidence and the adequacy of the jury's findings to establish a

B. The 6,100 shares William J. Powell purchased in the open market?

Answer 'It was' or 'It was not'

ANSWER: *It was*

C. The 5,379 shares received by William J. Powell that were due to him December 31, 1968?

Answer 'It was' or 'It was not'

ANSWER: *It was*

D. The 6,600 shares due to be received by William J. Powell on December 31, 1969?

Answer 'It was' or 'It was not'

ANSWER: *It was*

E. The 145 shares received by William J. Powell in late February 1970 as the result of an earlier stock dividend?

Answer 'It was' or 'It was not'

ANSWER: *It was*

* * * * * * * * * *

"SPECIAL ISSUE NO. 20

Do you find from a preponderance of the evidence that in March, 1970, there was a bona fide dispute between Plaintiffs and UCC as to the rights and obligations of the parties under the amended Stock Purchase Agreement of June 30, 1967, and with respect to the UCC stock delivered thereunder?

Answer 'Yes' or 'No.'

ANSWER: *Yes*

If you have answered the foregoing Special Issue 'Yes', then answer the following Special Issue. Otherwise you need not answer same.

"SPECIAL ISSUE NO. 21

[7] Many would be properly raised only if UCC had taken a cross-appeal from the jury findings adverse to it.

settlement agreement having the effect of barring recovery. Appellants correctly posit that the creation of a settlement agreement, as does the creation of any enforceable contract, requires a meeting of the minds of the contracting parties on the subject matter of the agreement. *See* Missouri, K. & T. Ry. Co. v. Texas, 275 S.W. 673 (Tex.Civ.App.1925, writ ref'd) and Mutual Fire & Auto. Ins. Co. v. Green, 235 S.W.2d 739 (Tex.Civ.App.1950, n. w. h.). Here appellants contend, the evidence does not show that the parties' minds ever met as to what their respective claims and controversies were and as to what each would do or give up in satisfaction of those claims and controversies. The court instructed the jury of question 21 that "agreed" meant a meeting of the minds. The appellants did not object to this instruction. UCC's General

Do you find from a preponderance of the evidence that in March, 1970, it was agreed, in substance, between Eldon Vaughan, acting for UCC, and Powell that in full and complete satisfaction of all claims and controversies between the parties UCC would register the Plaintiffs' UCC stock with the SEC and accelerate the remaining payments of UCC shares and cash to become due under the amended Stock Purchase Agreement of June 30, 1967?

Answer 'Yes' or 'No.'

ANSWER: *Yes*

By the term 'agreed' is meant a meeting of the minds.

If you have answered the foregoing Special Issue 'Yes', then answer the following Special Issue. Otherwise you need not answer same.

"SPECIAL ISSUE NO. 22

Do you find from a preponderance of the evidence that UCC was ready, willing and able to register the Plaintiffs' UCC stock with the SEC and to accelerate delivery of the remaining payments of UCC shares and cash to become due under the amended Stock Purchase Agreement of June 30, 1967, and would have done so, but for receiving the telegram from Powell on or about April 18, 1970?

Answer 'Yes' or 'No'

ANSWER: *Yes*

You are instructed in this connection that UCC was not required to continue performance of its agreement, if any you have found in answer to Special Issue No. 22 above after receiving the telegram from Powell on or about April 18, 1970."

Counsel Eldon Vaughan testified that he and Powell (who Murtagh concedes had authority to bind her to any agreement made with UCC) orally agreed on March 9, 1970 that if UCC would register appellants' stock and accelerate the remaining payments of stock and cash due them, appellants would release UCC from any liability and not initiate litigation against UCC. Powell denied that such an oral agreement had been made. The jury by its answer to question 21 found that the parties did agree to so settle "all claims and controversies," and there is adequate evidentiary support for this finding.

[3-5] The existence of an antecedent bona fide dispute between the parties concerning the subject matter of a subsequent settlement agreement is sufficient legal consideration for creation of an enforceable agreement. *See* El Paso County Water Imp. Dist No. 1 v. City of El Paso, 243 F.2d 927, 933 (CA5), cert. denied, 355 U.S. 820, 78 S.Ct. 26, 2 L.Ed.2d 36 (1957), and 12 Tex.Jur.2d, Compromise and Settlement §§ 5 and 6, pp. 290-92 (1960). The party claiming that a settlement agreement has been created has the burden of exhibiting that a bona fide dispute existed as to the subject matter. *See, e. g.*, Bergman Produce Co. v. Brown, 156 S.W. 1102 (Tex.Civ.App.1913, n. w. h.). The jury found appellants had established all elements requisite to their recovery from UCC for material misrepresentations and omissions and for conversion of their stock. But by its answer to question 20 the jury expressly found only that a bona fide dispute existed "as to the rights and obligations of the parties under the amended Stock Purchase Agreement." Hence, appellants contend, the answer to question 20 effectively establishes consideration for creation of a

settlement agreement barring only their breach of contract cause of action. UCC, they say, failed to carry its burden to establish an essential element for the creation of a settlement agreement adequate to bar recovery under the separate fraud and conversion claims. Even if we adopt appellants' restrictive reading of question 20 as applying to only a cause of action for breach of contract,[8] the appellants gain no ground. Rule 49(a) provides that if

> the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

UCC's responsive pleadings and the evidence at trial clearly raised an issue of whether there was a settlement agreement created to bar all of appellants' claims against UCC, and neither party raised an objection to the adequacy of question 20 to test for the existence of factual elements essential to creation of a settlement covering all of appellants' claims. Therefore, even if we were to conclude that necessary factual findings are missing in the

[8] There are reasons for reading question 20 more expansively. While appellants have characterized their suit as an action for one sum of damages for each of three separate types of injurious conduct by UCC — fraud, conversion, and breach of contract — close reading of the charge and special questions reveals that the District Court never separated the case so neatly into three parts. The fraud and conversion causes are separately identifiable, but the District Court did not ask the jury to consider also an independent breach of contract claim. Rather, considerations of what the Stock Purchase Agreement called for prevade and provide the matrix for the fraud and conversion claims which the jury was required to consider. And, by question 21, the court required the jury to find whether UCC and appellants "agreed" to settle "all claims and controversies between the parties," not just a breach of contract claim.

jury's answer to question 20, we would deem that the District Court in accord with its entry of judgment for UCC made findings that antecedent bona fide disputes existed between the parties as to whether UCC committed fraud and conversion. And such deemed findings would not be clearly erroneous on this record. *See* Fed.R. of Civ.P. 49(a) and 52(a); Williams v. Aetna Casualty & Surety Co., 239 F.2d 250, 252-253 (CA5 1956).

[6-10] 2. Appellants' second group of contentions concerning the settlement agreement constitute an argument that, even if a settlement agreement was created, it cannot bar their recovery for UCC's violations of the anti-fraud provisions of federal securities laws because such a settlement would be void as against public policy. The federal securities laws do not compel persons harmed by acts violating provisions of the laws to seek their remedies only through litigation. *See* Wilko v. Swan, 346 U.S. 427, 438, 74 S.Ct. 182, 98 L.Ed. 168, 177 (1953) and Moran v. Paine, Webber, Jackson & Curtis, 389 F.2d 242, 245-246 (CA3 1968). Notwithstanding the provisions of the securities laws expressly voiding any private agreement waiving compliance with provisions of the laws,[9] settlements of claims arising from acts which are violations of the securities laws are not void as a matter of law, at least where such settlement agreements do not themselves continue the pre-

[9] § 14 of the Securities Act of 1933 [15 U.S.C.A. § 77n (1971)] provides:

"Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

§ 29(a) of the Securities and Exchange Act of 1934 [15 U.S.C.A. § 78cc(a) (1971)] provides:

"Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

cise conduct which violates the laws. *See* Cohen v. Tenney Corp., 318 F.Supp. 280, 283-285 (S.D.N.Y. 1970 and *cf.* Pearlstein v. Scudder & German, 429 F.2d 1136 (CA2 1970), cert. denied, 401 U.S. 1013, 91 S.Ct. 1250, 28 L.Ed.2d 550 (1971). But judicial hostility toward waviers of statutory rights requires that the right to private suit extended by the securities laws for alleged violations be scrupulously preserved against unintentional or involuntary relinquishment. *See* Cohen v. Tenney Corp., *supra.* Courts can scrutinize the settlement agreement to determine whether the waiver of private rights accomplished thereby is intentional. Appellants rely upon Childs v. RIC Group, Inc., 331 F.Supp. 1078, 1083 (N.D.Ga.1970), aff'd, 447 F.2d 1407 (CA5 1971), for the proposition that to support a finding of intentional waiver by settlement of a right granted private parties by the securities laws it must be specifically found that the particular statutory right was actually known. And, since no express factual finding of their actual knowledge of rights under the securities laws was made here, appellants say the settlement cannot bar their recovery for the securities fraud which the jury found.

This argument too must be rejected because of the operation of Rule 49(a). There are no request to the court that it submit a question to the jury requiring a finding of whether appellants had intentionally and knowingly waived the rights granted them by the securities laws. It then was proper for the court to rule upon that question, and we must deem that the court consistent with its judgment for UCC found that appellants intentionally and knowingly waived their statutory rights under the securities acts. We are unable to say that such a finding is clearly erroneous,

Williams v. Aetna Casualty & Surety Co., *supra*, 239 F.2d at 252-253, since the record reveals that prior to the time Powell orally agreed to settle he had retained American counsel and had been advised to sue UCC. Indeed Powell brought to the settlement meeting and showed to UCC General Counsel Vaughan prior to their oral agreement, a draft letter from Powell's American counsel threatening suit if a settlement were not reached.

[11] 3. Finally appellants challenge the operation of the settlement agreement to bar their claims by arguing that even if such an agreement was made at Powell's March 9 meeting with Vaughan, it subsequently was repudiated by UCC, or was repudiated by appellants and then rescinded by UCC's acceptance of appellants' repudiation and suspension of its performance. The settlement agreement found in question 21 expressly recounts affirmative duties required of only UCC. Question 21 does not refer to a duty on appellants to execute a release agreement, although it does specify that the settlement agreement was "in full and complete satisfaction of all claims and controversies between the parties." Appellants, therefore, make a two-prong contention, the first of which is that if there was a settlement agreement UCC repudiated it by in effect conditioning its performance of an already agreed upon matter on the acceptance of an additional term [a written release] not found by the jury (in answer to question 21) to be part of their agreement. This theory — whether considered as expressing a condition not bargained for by UCC, or if bargained for prematurely asserted because any release was only required contemporaneously with full performance by UCC — was not properly presented at trial. It

was not the subject of an interrogatory, nor did appellants request that it be. It was not covered in jury instructions, and appellants made no objection on such ground. Nor did appellants argue the theory to the jury. It surfaced for the first time in motion for new trial. Again, appellants run head on into Rule 49(a), which requires us to deem that consistent with its judgment for UCC the trial court found that UCC's demand for the release was neither unjustified nor untimely.[10]

The second prong to appellant's after-trial theory is that if Powell's telegram was a repudiation UCC "accepted" the repudiation and suspended its performance. For two reasons this lacks merit. The court instructed without objection that there was no further obligation on defendant to perform after receipt of the April 18 telegram.[11] Also, after receipt of the telegram UCC proceeded at its expense to

[10] Additionally, the evidence does not support in the slightest degree a claim that the telegram of April 18, sent by Powell to UCC, had any relation to UCC's letter of March 19 sending the release to be executed. The telegram said: "Your terms for agreement with Powell and Murtagh are not accepted." This language, the testimony of UCC, Powell and Murtagh, and the exhibits, reflect with total clarity that the telegraph was a statement by Powell of his position that he had not entered into a settlement agreement at all on March 9, a position that the jury rejected. Beginning March 9 UCC took many necessary steps toward completion of matters required of it by the March 9 agreement. At their end, Murtagh understood Powell to tell her by telephone that an agreement had been reached on March 9, and based on that conversation she sent a letter to UCC, with a copy to Powell, acknowledging her understanding and stating her intent to move forward with the agreement. Powell received his copy of her letter, called her, and told her she has misunderstood him because he had merely told her what UCC had offered and not that he had agreed to accept the offer. Then he dispatched the telegram. Upon receipt of it, Vaughan called Powell, and according to Vaughan's testimony, not controverted by Powell, Powell made no objection to the release but said the settlement was no longer acceptable because Murtagh was disturbed about the registration statement under which their shares would be registered and the way the company was being managed. There is no substantial evidence relating the April 18 telegram to the request for a release.

[11] See Restatement of Contracts § 417; Hill v. Schultz, 248 S.W.2d 535 (Tex.Civ.App.1952); American Textile Mach. Co. v. United States, 220 F.2d 584 (CA6 1955).

complete the necessary SEC registration to permit appellants to sell their stock, and after the registration was effective appellants took advantage of it by selling. Subsequently UCC delivered the remaining stock and cash. Thus appellant's complaint is that times of delivery of the additional stock and cash were not accelerated as agreed and in the interim the market price of UCC stock declined.

In the end, this case reduces itself to matters that can be simply stated. The jury found that UCC had wronged the appellants, but found also, contrary to appellants' version, that the matters between UCC and appellants were the subject of a settlement agreement. It found that UCC was ready, willing and able to perform until it received Powell's telegram of April 18 and would have performed but for that telegram. The after-trial claim that even if there was a settlement it was negated by UCC's subsequent action in calling for a written release must fail because Rule 49(a) forecloses it and, in any event, the claim wholly lacks evidentiary support. And, as we have noted, after receipt of the telegram, UCC performed a substantial part of what it had undertaken by the settlement agreement to do, although under the instructions to the jury further performance was not required of it.

Affirmed.

APPENDIX "B"
STATUTORY PROVISIONS

SECURITIES ACT OF 1933

§14

Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

SECURITIES ACT OF 1933

§17(a)

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly, or indirectly —

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or,

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

SECURITIES EXCHANGE ACT OF 1934

§10(b)

It shall be unlawful for any person directly or indirectly by the use of any means or instrumentality of interstate commerce or of the mails or of any facility of any national securities exchange —

(b) to use or employ in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

§29(a)

Any condition, stipulation or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder or of any rule of an exchange required thereby shall be void.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 49

(a) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written

forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

RULE 51. INSTRUCTIONS TO JURY: OBJECTION

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.